IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HEARST PUBLICATIONS, INCORPORATED, a corporation, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 11,781 No. 11,782
THE CHRONICLE PUBLISHING COMPANY, a corporation, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 11,783 No. 11,784

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

AMICI CURIAE BRIEF OF PUBLISHERS.

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AMICI CURIAE BRIEF OF PUBLISHERS.

INTEREST OF NEWSPAPER PUBLISHERS.

This amici curiae brief is filed pursuant to the order of this Court made January 28, 1948, granting petitioners' permission to file it, and is filed on behalf of publishers of daily newspapers published in various cities located in the Ninth Circuit. These publishers sell newspapers at wholesale rates to vendors who make a business of selling at retail such newspapers (and often other articles) to the public on city streets.

The issue in this case—whether such vendors are independent contractors and accordingly without the

provisions of Social Security legislation—is generally of prime interest to all newspaper publishers who make such wholesale sales to such retailers. Said Pacific Coast publishers believe that the views herein expressed are those of similarly circumstanced publishers located elsewhere in the United States.

Until the rendition of the judgment of the District Court herein, newspaper publishers generally held the view that vendors purchasing papers from them for resale to the public were not covered by the Social Security Act. They were aware that Congress in enacting the Social Security Act had refused to define who was an employee, thus impliedly being content with the common law conception; that in the hearings before the Congressional Committees it appeared that retailers and small tradesmen—such as the push-cart peddlers and other similarly self-employed persons—were not to be covered by the Act; and that it was then recognized that the legislation was still experimental and that there were serious administrative and collection difficulties with regard to them.

The publishers knew that the Regulation of the Federal Security Agency[1] contained practically the same definition of employee and independent contractor as prevailed at common law and that no substantial change in these regulations had been made since their promulgation shortly after the enactment of the Act, and that these regulations had been approved by Congress by the reenactment of pertinent provisions of

[1]Treas. Reg. 90, promulgated under Title IX of the Social Security Act, Art. 205; see note 15.

the Act while these regulations were in effect. The newspapers also knew of the unsuccessful efforts of the Social Security Board to bring those engaged in retail trade within the coverage of the Act.[2]

The newspapers knew that although a period of twelve years had elapsed since the passage of the Act, the Internal Revenue Department, although it knew that the withholding income tax provisions of the Internal Revenue Code covered the same persons as the provisions of the Social Security Act, had made no claim that vendors were within the coverage of the Act or the Code, and had made no attempt to require income taxes to be withheld as to them. The publishers also knew that during this twelve year period no Court had held that vendors were covered by, or were ever intended to be covered by, the Social Security legislation.

Accordingly, newspapers were at a loss to understand the decision of the District Court herein, when in April 1947, it held that the vendors were employees within the coverage of the Social Security Act. They were unable to differentiate between retailers of merchandise (admittedly without the coverage of the Act) and vendors of newspapers. They were keenly aware that those engaged in the newspaper industry were beset by many unusual burdens—notably, the great losses caused by their inability to purchase newsprint; that many newspapers had been forced to suspend publication because of the inability to operate profit-

[2] *Nevin, Inc. v. Rothensies*, 58 Fed. Supp. 460, affirmed 151 Fed. (2d) 189.

ably; and that the Courts had been alert to protect those in the newspaper industry from unjust discrimination.[3]

THE FACTS.

Here, the vendors bought their papers at wholesale from newspaper publishers and sold them at retail to the public on the streets. They were adult persons. They negotiated with the publishers, through a Union acting for them as a buyers' representative, with regard to the wholesale price they were to pay for the newspapers and the retail price thereof, and with regard to the protection to be given them from certain kinds of newsboy competition, and to the places they were to carry on their businesses. These negotiations resulted in a contract between the publishers and the vendors (represented by the Union) and also individual contracts between each publisher and vendor. The parties therein agreed on types of corners at which the vendors should carry on their respective businesses; and provided that, when a place of business at a corner became vacant, the vendors' association would supply the publisher with a list of vendors who desired to engage in business at such corner, so

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[3] *Near v. Minnesota*, 283 U. S. 697, in which the Court said:

"The newspapers, magazines and other journals (of the country, it is safe to say, have shed and continue to shed more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon mis-government, the suppression of abridgement of the publicity afforded by a free press cannot be regarded otherwise than with great concern." (See also *Grosjean v. American Press Co.*, 297 U. S. 233.)

that the vendor and the publisher could arrange for the setting up of business by the vendor at such location. They agreed that a vendor who had a contract for a corner was entitled to continue his place of business there, but that this contractual right could be terminated, in the event the vendor defaulted in the performance of the contract.

It appeared, both from the contract and the conduct of the parties, that the vendor alone had the right to specify, and did specify, the number of papers he would purchase; that the publisher had no right to control or direct—nor did he control or direct—the vendor as to the means or details through which the vendor's sales were effected. The publisher furnished the vendor with no place to work—the place where the vendor carried on his business was agreed upon by negotiations between vendor and publisher. The vendors bought at the wholesale price, agreed upon between the parties by negotiation, and sold at a retail price likewise agreed upon between them. Their profits were the difference between (a) the retail price which they received for the papers sold, and (b) the wholesale price of newspapers purchased by them less business losses through theft, damage by the elements and bad credit. The vendors were not required to, nor did they, receive orders or directions from the publishers, make reports to the publishers, or attend sales or other meetings with the publishers. Most of the vendors sold competitive newspapers. All of them had the right to sell, and over 1/4th of them sold—in addition to San Francisco newspapers—such items as

newspapers from other localities, books, racing forms, magazines, candies, chewing gum, cigars, cigarettes, pencils and similar articles. All vendors had a right to enlarge their businesses and a number of them did so—conducting retail stores from large stands from which they sold a variety of merchandise and commodities in addition to the above-described publications. Photographs of such stands were admitted in evidence.

When the vendors negotiated with the publishers, it was ascertained that, at certain locations at which the publishers desired sales outlets, the probable profit would be insufficient to induce the vendor to conduct his business there. Accordingly, the publishers guaranteed that the vendor's profit from the sale of newspapers would equal an agreed figure. On the average, the profits of the vendors at more than 80% of the locations exceeded the agreed figure. Therefore, less than 20% of the vendors were concerned with the guarantee.

Publishers' employees, called "wholesalers," were the only persons who had contact with the vendors on behalf of the publishers. These wholesalers did not control, and did not have the right to control, the vendors in any way. If they observed a default in the contract by the vendors, they reported it to the publishers. They delivered papers to the retailers, picked up unsold newspapers for which the vendor was entitled to credit, and collected the wholesale price from the vendors for the papers not returned. They gave no

orders to the vendors and were not authorized to do so.

The contract and the conduct of the parties shows that a seller-buyer relationship existed between them.

Generalizing: The vendors had the right to conduct their businesses as they saw fit, so that the energetic and ambitious could, and did, enlarge their profits, whereas those less energetic and less capable enjoyed smaller business success.

These vendors carried on their businesses in much the same manner as do the proprietors of flower stands, peanut stands, fruit stands, and merchandising stands who carry on their businesses in the streets of the cities and in the lobbies of hotels and office buildings.

LEGISLATIVE HISTORY OF THE ACT AND ITS AMENDMENT.

(a) The 1935 situation.

Both prior to and during the session of the 74th Congress in 1935, committees had made extensive studies with regard to the Social Security legislation. These studies and reports developed that large numbers of persons suffered from the insecurities of old age and the inability to be gainfully occupied; that these insecurities applied not only to all classes of industrial employees but also to small businessmen, to those who were self-employed, to those engaged in the professions and to those engaged in non-industrial

occupations such as farm laborers, domestics, teachers and governmental and institutional workers.[4]

Because of administrative, collection, and enforcement difficulties, small shopkeepers, merchants and businessmen, self-employed persons, farm laborers, professional people, domestics, teachers, governmental and institutional workers were all made ineligible under the Social Security legislation. Those in charge of the legislation described the situation as follows:

> "* * * the administrative difficulties cannot be disregarded * * * It is desirable, in order to reduce pension costs, to include these other self-employed groups, but no effective method of collection from these self-employed groups has yet been devised anywhere in the world. * * * The employed group can be reached because we can collect from the employer and authorize him to deduct from the employee. It is again a question of administration. The desirability of bringing in the entire population is very evident, but the difficulties of doing it are such that we, as yet, do not know how we can bring in the self-employed."[5]

> "If these three classes of workers (casual laborers, domestic servants and agricultural workers) are to be included, however, the task may well prove insuperable—certainly at the outset. * * * we should greatly regret the imposition of admin-

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[4]Testimony of Edwin E. Witte, Executive Director of the Committee for Economic Security, before the Committee on Finance, U. S. Senate, 74th Congress, First Session, on S. 1130, at p. 32.

[5]Testimony of Edwin E. Witte, Executive Director of the Committee for Economic Security, before the Committee on Finance, U. S. Senate, 74th Congress, First Session, on S. 1130, at pp. 198, 199.

istrative burdens in the bill that would threaten the continued operation of the entire system.'"[6]

"You cannot make collections from farmers at this time. You cannot collect contributions from domestic servants. You cannot collect contributions from *push-cart peddlers and small-store proprietors.* It will cost you twice as much to collect as the amount of money that you will collect." (Emphasis ours.)[7]

As a result, this legislation covered only about 25,804,000 out of 48,830,000 workers in gainful occupations—a less than 55% coverage.[8]

It was recognized that the 45% not covered (comprising the classes immediately above mentioned) would probably suffer from the insecurities of old-age and the inability to remain in gainful occupation to as great extent as those covered by the Act.

In these Committee discussions and reports, it was expressly stated that the following classes (amongst others) were not to be covered by the legislation: "proprietors, tenants, or the self-employed,[9] farmers,

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[6]Statement of Hon. Henry Morgenthau, Jr., Secretary of the Treasury, before the Committee on Economic Security contained in Hearings before the Committee on Ways and Means, House of Representatives, 74th Congress, First Session, p. 902.

[7]Statement of Abraham Epstein, Executive Secretary, American Association for Social Security, before the Committee on Economic Security, in Hearings before the Committee on Ways and Means, House of Representatives, 74th Congress, First Session, at p. 559.

[8]Report No. 628 of Senate Committee on Finance on the Social Security Bill, before the 74th Congress, First Session, at p. 26.

[9]Report of the Committee on Economic Security before the Committee on Ways and Means, House of Representatives, 74th Congress, First Session, at p. 58.

small shopkeepers, and housewives,[10] push-cart peddlers and small-store proprietors".[11]

According to the present Chairman of the Ways and Means Committee, those in charge of the legislation stated at the Committee meetings that news vendors were not covered by the legislation. But even in the absence of such assurance, the intention to exclude the street vendor from coverage was evident for he is a "small businessman", "a proprietor", "a small shopkeeper", "a tradesman", and in the same class as a "push-cart peddler".

(b) The 1939 situation.

At the Session of Congress held in 1939 Congressional Committees again studied the coverage of the Social Security Act. The report of Arthur J. Altmeyer, Chairman of the Social Security Board, to the President and to the Congressional Committees, was to the effect that the Social Security legislation had covered only 50% of those gainfully occupied.[12]

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[10]Statement of J. Douglas Brown, Director of Industrial Relations Section, Committee on Economic Security before the Committee on Ways and Means, House of Representatives, 74th Congress, First Session, at pp. 240-41.

[11]Statement of Abraham Epstein, Executive Secretary, American Assn. for Social Security, on Report of the Committee on Economic Security, in hearings before the Committee on Ways and Means, House of Representatives, 74th Congress, First Session, at p. 559.

[12]Vol. I, Hearings relative to the Social Security Act Amendments of 1939 before the Committee on Ways and Means, 66th Congress, First Session, p. 6.

The Social Security Board did not attempt to directly extend coverage of the Social Security Act to self-employed persons or to businessmen.[13]

But the Social Security Board did attempt to extend the coverage of the Act to salesmen through enlarging the definition of the term "employee" in the Act to include persons other than employees under the common law. Congress defeated the Bill.[14]

(c) The situation since 1939.

The original Regulation[15] recognizing the common

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[13]The final report of the Advisory Council on Social Security stated:

"The Board has again studied the probability of including self-employed persons under the old-age insurance system. However, the Board is not prepared at this time to recommend what it considers a practical method of extending coverage to such persons. * * *" (p. 8.)

"A study should be made of the administration, legal and financial problems involved in the coverage of self-employed persons. * * *" (p. 22.)

"An important group outside of the existing program are those persons working on their own account, such as business and professional men, farmers and mechanics. * * *" (p. 38.)

Vol. II, Hearings relative to the Social Security Act Amendments of 1939 before Committee on Ways and Means, 66th Congress, First Session.

[14]H.R. 6635, 76th Congress. Defeated by Senate. See note 16.

[15]Treasury Regulation 90, promulgated under Title IX of the Social Security Act, Art. 205, provides in part:

"Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done * * * the right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an

law conception of "employee" and "independent contractor" still stand without any substantial change therein.

The Federal Security Agency had attempted to induce Congress to enlarge the definition but had been unsuccessful. Congress, in 1939, by its vote on H. R. 6635, had refused to broaden the law by redefining "employee" under the Social Security Act to include a "person who is not an employee * * * under law of master and servant" (the common law).[16] Congress thereby made clear its intention that the common law conception of "employee" and "independent contractor" should continue to prevail. By thus appealing to Congress to enlarge the definition by legislation, the Agency, at that time, had recognized that the enlargement of the definition could be effected only by Congressional action.

Accordingly, the situation that existed at the time of the trial of this case was that Regulation 90, setting out the common law conception of "employee" was a regulation of long standing; had been in effect prior to 1939 when the Act was amended and at subsequent Congressional sessions when provisions of the Act had been reenacted. As a result the construction of

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individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee * * *" (26 CFR § 400.205. See also Treasury Regulation 91, 26 CFR § 401.3.)

[16]H.R. 6635, 76th Congress. To redefine "employee" under the Social Security Act to include "a person who is not an employee of such person under the 'law of master and servant'." Defeated by Senate.

the Social Security Act contained in Regulation 90 had been adopted by Congress through the reenactment of the pertinent provisions of the Social Security statute while said Regulation was in effect.[17]

Moreover, it has been held that Regulation 90 was approved by Congress and, therefore, is in conformity with the law.

Under this regulation, which now has the force of law, the news vendors are not employees and are not covered by the Act.

A discussion of the legislative history of Social Security legislation would be incomplete without reference to the recent Supreme Court cases known as the *Greyvan* and *Silk* cases,[18] where it was held that truckers were independent contractors without the coverage of the Social Security legislation.

We shall briefly discuss the dicta in the opinion.

It will be noted that the court stated that its attention had not been called to anything helpful in the "legislative history of the passage of the Act or the amendments thereto."[19]

The substance of this dicta is that the Social Security Act is to be liberally construed, giving regard to the "mischief to be corrected by the Act"; that the courts should take a realistic rather than a purely technical view of the relationship, but are not privi-

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[17]53 Stats. 1; 53 Stats. 175, 183. See also *Brewster v. Gage*, 280 U. S. 327, 337 (1930).

[18]*U. S. v. Silk* and *Harrisson v. Greyvan Lines*, 91 L. ed. (Adv. Op.) 1335.

[19]Silk opinion, supra, p. 1341.

leged to disregard the business arrangements between the parties, in determining their relationship.

It is evident that had the court's attention been called to the legislative history of the Act and its amendments, the views contained in the dicta would have been further clarified—particularly in regard to the National Labor Relations Act as compared to the Social Security Act.

After a study of such legislative history, the court necessarily would have concluded that the National Labor Relations Act was intended to benefit all classes which had to bargain as to wages, hours and working conditions with employers—the "mischief" in that case being "inequality of bargaining in controversies over wages, hours and working conditions."

On the other hand, the court would have necessarily concluded that the Social Security Act was intended to cover only about 55% of the classes subject to the insecurities of old-age and the inability to obtain gainful occupations even though the "mischief" in this instance—the insecurities of old-age and the inability to be gainfully occupied—applied to practically everyone.

It is obvious that a study of the history of the Social Security Act will disclose that the attention of the legislators in enacting the legislation was directed particularly toward the fact that no relief was to be afforded to 45% of the persons who were subject to the insecurities of old-age and the lack of gainful employment; and that the legislators' attention was es-

pecially directed toward the classes of persons it was purposely omitting from coverage. Accordingly, had there been a study by the court of such legislative history in the *Greyvan* and *Silk* cases, the court would have decided that, in the first place, Congress intentionally omitted from the scope of the legislation large classes of persons "subject to the mischief"—such as the small shopkeepers, merchants and businessmen, self-employed persons, professional people, sharecroppers, independent contractors, push-cart peddlers and the like—and in the second place, specifically exempted from coverage certain types of employees—such as farm laborers, domestics, teachers, governmental and institutional workers, and the like.

When consideration is given to the legislative history of the Act and the amendments thereto and to the "mischief to be corrected" by the respective acts, the conclusion must necessarily be drawn that the vendors were intended to be and actually were without the coverage of the Social Security Act.

THE SUPREME COURT DECISION IN THE SILK AND GREYVAN CASES, WHEN STRIPPED OF THEIR DICTA, SET OUT SOUND PRINCIPLES FOR THE DETERMINATION OF THE INDEPENDENT CONTRACTOR RELATIONSHIP.

Since the *Silk* and *Greyvan* cases contain the latest expressions of the Supreme Court on the factors here to be considered in determining the independent contractor relationship, we will briefly consider the per-

tinent portions of the decisions, particularly as applied to the undisputed facts in this case.

Under the *Silk* and *Greyvan* decisions, the facts must be viewed realistically and not technically, weight must be given to the long-standing Treasury Regulation 90 to the effect that a person is not an employee unless he is subject to the will and control of an employer, not only as to what shall be done but how it shall be done, and the court should also consider, amongst other factors, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation.

The Supreme Court further stressed that a realistic approach would not justify the changing by the court of any existing normal business relationship and that persons could be independent contractors even though their business was an integral part of larger business operations of an industry.

The Record in this case discloses that if consideration is given to the factors which the Supreme Court stated were important in the determination of the employee status, the vendors here are necessarily independent contractors.

The undisputed evidence shows that the publishers neither controlled the vendors nor had the right to control them as to how the functions of the vendors were to be carried out and that the only controls existing between the parties are those usually existing between a buyer and a seller. There is no evidence

here that the publishers dictated to, or had the right to dictate to, the vendors as to the details and means of selling their newspapers. The vendors could sell the newspapers in any manner they saw fit. It is a matter of common knowledge that newspaper vendors develop independent techniques and skill in selling, that there are many varieties of selling talk and approach, and that a vendor who is original, enterprising and industrious will make outstanding sales as compared to the less-enterprising and less-original vendor. Admittedly the proprietor of a lobby tobacco stand, selling cigarettes and other articles to the public, is an independent contractor and conducts his business in almost the identical way as does a news vendor. Each of these types of vendors controls, and has the exclusive right to control, the manner in which his own business operations are conducted.

The vendor's opportunity for profit also depends, in large part, upon his individual initiative, industry and ambition. Moreover, the vendor's opportunity to increase his profits is not limited to the sale of newspapers alone—he has the opportunity to expand his business. The alert vendor handles many lines of merchandise.

Similarly, his losses are due to his own course of conduct. Some losses are unavoidable. If, after delivery, his papers are stolen, he must bear the loss. If, as frequently happens in some cities, the newspapers are damaged or destroyed by rain, snow or other element, or are blown away by the wind, the loss is solely the vendor's. If the vendor has not used

good judgment in extending credit to customers, he alone must bear the burden of loss.

It is clear that the publishers do not limit the amount of profit of the respective vendors, that some vendors' profits are several times larger than those of others and that the patronage which a vendor builds up at a certain location through his own efforts is a valuable right, in the nature of good-will.

Admittedly, the investment of some vendors in facilities is not large, However, other vendors have rather elaborate stands and lay-outs. Obviously, the average vendor has a small business which does not require large capital. But neither is large capital required for a tobacco stand in a hotel lobby, or for a push-cart peddler, or for an owner of a street flower stand, or a street peanut vendor—all recognized as independent business men operating on a small scale and without large capital outlays.

The undisputed evidence shows that the vendor depends upon his own initiative, judgment and energy for a large part of his success.

We believe it is clear that an application of the tests suggested in the *Greyvan* and *Silk* cases inescapably leads to the conclusion that vendors are independent merchants.

MISCONCEPTIONS AFFECTING THE DECISION.

We believe that the opinion and findings disclose that the District Court misconceived some of the facts

of the case and that its reliance on such misconceptions led to erroneous conclusions.

One of the major misconceptions relates to the nature of the publishers' and the vendors' respective operations.

The opinion of the District Court states that the functions of the vendors are an integral part of the publisher's business (R. 46); that the publisher's function is to disseminate information and that the vendors in turn in selling the newspapers are not retailers but, on the contrary, are merely agents aiding the publisher in the dissemination of information (R. 39).

It is obvious that the sale of newspapers at retail can be regarded from several viewpoints and that one of these viewpoints could be that such sale is a service to a customer. It is clear that this conception is not the realistic and practical one which the Supreme Court has recently indicated must be entertained with regard to the Social Security Act.[20]

A history of the legislation has shown a continuous policy of Congress against the extension of Social Security to transactions presenting serious administrative and collection problems.[21]

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[20] *U. S. v. Silk* and *Harrisson v. Greyvan Lines*, 91 L. ed. (Adv. Ops.) 1335.

[21] It is to be recalled that in enacting this Act, the legislators purposely excluded persons in the class of small-store proprietors and push-cart peddlers because of difficulties of administration and collection. The following statement was made before the Committee on Economic Security in Hearings before the Committee on Ways and Means, House of Representatives, 74th Con-

An application of the District Court's theory that the transaction should be regarded solely as a service would present insuperable administrative and collection problems to wholesalers, vendors and the Agency.

It is recalled that vendors handle racing forms, local papers, "People's World," out-of-town papers, monthly and weekly magazines of endless variety, comic books and many other small articles. The vendor's arrangement with the publishers and wholesalers differ as to each of these publications. His margin of profit differs and the net profit differs, as to each.

None of the parties would find it possible to ascertain the amount of net profit or the amount of tax as to each publication. Clearly the publisher or wholesaler who has to make the return would be unable to determine the exact amount and it is equally obvious that the vendors with their limited knowledge of bookkeeping and accounting could offer no assistance.

Thus the pursuit of the theory of the District Court —that under the Social Security Act the vendor's selling transactions must be regarded solely as a service—would lead to the administrative and collection difficulties which the legislators continuously have been seeking to avoid. The unreasonable result which would, of necessity, follow from the District Court's theory clearly indicates that its interpretation should be avoided.

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gress, First Session, on H.R. 4120: "You cannot collect contributions from push-cart peddlers and small-store proprietors. It will cost you twice as much to collect as the amount of money that you will collect." (p. 559.)

It is obviously not the practical conception which the Supreme Court has indicated must be entertained.

We believe it is clear that, under the Social Security Act, the retail sale of the newspaper should not be regarded as the rendition of a service.

But even if the transaction should be regarded as the rendition of a service, this conception appears to be of no consequence since here the information was disseminated through the medium of independent contractors—just as merchandise sold in department stores is delivered by truckers acting as independent contractors.

It is clear, under the principles announced in the *Greyvan* and *Silk* cases, that—irrespective of whether a business operation is a service, or a manufacturing, selling or distribution process—a portion of the process can be and frequently is performed by independent contractors. Accordingly, even if it is assumed that the sale of newspapers by vendors can be regarded as the performance of an integral part of a distribution service, the vendors effecting such sales could be, and actually are, independent contractors. This principle is clearly stated in the *Greyvan* and *Silk* cases.[22]

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[22] *U. S. v. Silk* and *Harrisson v. Greyvan Lines*, 91 L. ed. (Adv. Ops.) 1335, in which the Court said:

> "Of course, this does not mean that all who render service to an industry are employees. Compare Metcalf & Eddy v. Mitchell, 269 U. S. 514, 520, 70 L. ed. 384, 390, 46 S. Ct. 172. Obviously the private contractor who undertakes to build at a fixed price or on cost-plus a new plant on specifications is not an employee of the industry thus served nor are his employees. *The distributor who undertakes to market*

We believe that another cause for the District Court's erroneous conclusion was its conception that certain factors were indicative of an employee relationship—whereas, actually, such factors exist in the *usual* buyer and seller arrangement. In connection with this phase of the case, it should be borne in mind that all parties to the contract believed that, and the agreement between them was executed on the basis that, the vendors were independent contractors; that no effort was made to effect tax avoidance; and it is a cardinal principle that in enforcing the Act the normal business relationships should not be disturbed.

We have had an opportunity to examine the brief filed herein by Appellants. We share, and are fully in accord with, the views it expresses.

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at his own risk the product of another, or the producer who agrees so to manufacture for another ordinarily cannot be said to have the employer-employee relationship. Production and distribution are different segments of business. The purposes of the legislation are not frustrated because the Government collects employment taxes from the distributor instead of the producer or the other way around." (p. 1341.)

"* * * There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution. Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors. The Social Security Act was drawn with this industrial situation as a part of the surroundings in which it was to be enforced. Where a part of an industrial process is in the hands of independent contractors, they are the ones who should pay the social security taxes." (p. 1342.) (Emphasis ours.)

Appellants' brief fully discusses the relationship between the parties as disclosed by the Record, and a further discussion would be unnecessarily repetitious.

It is our belief that a study of the Record and Appellants' brief leads to the conclusion in this case that the usual incidents of an employee relationship are lacking and that the vendors must be regarded as retail merchants without the coverage of the Social Security Act.

THE COURT IS NOT BOUND BY THE ADMINISTRATIVE DETERMINATION.

We wish to point out that this Court should attach no significance to the fact that, in this instance, the Federal Security Agency has made an administrative determination with regard to the vendors. There are many instances in the past where this Agency has made an administrative determination directly contrary to its own regulations, only to withdraw from the determination when it was disputed by the taxpayers in proceedings before the Agency or in the courts.

As we have shown in our discussion of the legislative history of the Act, Treasury Regulation 90, ever since its early promulgation, has limited the coverage of the Act to employees who were such under the master and servant doctrine; the Social Security Agency has failed in all of its repeated efforts to

change this regulation; and Congress has steadfastly refused its appeals to enlarge the definition of "employee". Actually, Congress has gone further, for it has adopted the construction of the Act contained in Treasury Regulation 90 by reenactment of the Act while the regulation was in effect.

Despite its knowledge of the above recited facts, the Agency, from time to time, has attempted indirectly, by *administrative* action, to enlarge the coverage of the Act beyond that permitted by the Act itself and by Treasury Regulation 90.

For example, despite the provision of the law and its own Regulation 90 excluding the self-employed, the Social Security Agency, by *administrative action,* has ruled that an independent worker making needlecraft articles at home was an employee;[23] and despite the statements in its own Regulation 90 that physicians, lawyers and others who follow an independent trade, business or profession are independent contractors, the Agency has ruled that a physician was within the coverage of the Act;[24] and in face of its own Regulation 90 that persons who follow an independent business are independent contractors, the Agency made an administrative determination that the owner of a retail store was not an independent contractor, but was an employee.[25]

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[23]*Glenn v. Beard* (C.C.A. 6th, 1944), 141 F. (2d) 376.
[24]*U. S. v. Aberdeen Aerie No. 24* (C.C.A. 9th Cir., 1945), 148 F. (2d) 655.
[25]*Nevin, Inc. v. Rothensies,* 58 Fed. Supp. 460.

The Courts in all these cases held that the Commissioner went beyond the intent of the Act and acted in excess of his statutory authority.

It is equally significant that the Internal Revenue Bureau, which, with the Social Security Agency, is a branch of the Treasury Department, does not consider these vendors as employees. Although the Internal Revenue Bureau is charged with the administration of the withholding of income taxes under provisions which, as to coverage, are identical with those of the Social Security Act, the Bureau has never attempted to enforce with respect to vendors. Apparently the Bureau is convinced that Congress never intended vendors to be within the coverage of the Act.

We believe that the administrative determination here went far beyond the congressional intent and the statutory power of the Agency; and, using the language of the *Bartels* case, "We are of the opinion that such administrative action goes beyond routine and exceeds the statutory power of the Commissioner."[26]

We respectfully urge that, in view of the legislative history of the Act and of the facts established by the record in this case, this Court determine that these

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[26] *Bartels v. Birmingham* and *Geer v. Birmingham*, 91 L. ed. (Adv. Op.) 1584, at 1587.

vendors are small businessmen and without the coverage of the Social Security Act.

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